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Supreme Court, U.S.
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NO. 94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

WILLIE WILLIAMS, III,

Respondent.

INTRODUCTION

In this brief, the Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota, reply to the Respondent's argument set out in his "Opposition to Petition for Writ of Certiorari. (Op. Pet.)" It is argued therein that the present case is governed by controlling precedent and there is thus no

legitimate basis for granting the petition for writ of certiorari.[1] The obvious fallacy with the position taken by Respondent in that it is based on the erroneous premise that the outcome of this case is dictated by the holding in Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) aff'd mem. 390 U.S. 713 (1968). Moreover, despite Respondent's assertion to the contrary, there is also a widespread conflict between and within the

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[1]A motion was also filed by Respondent asking that the petition be dismissed for what he maintains was inadequate proof of service and filing. The Respondent asserts that the certificate of mailing executed by counsel for Petitioners failed to indicate that the petition was mailed to the clerk by first class mail and that service was thus defective since the petition was allegedly not received by the clerk before January 18, 1995. As shown in the appendix, however, Petitioners were notified in a letter dated February 1, 1995, that the petition for writ of certiorari was docketed by this Court on January 18, 1995. Addendum A-1. The Petitioners would therefore ask that Respondent's Motion to Dismiss the Petition be denied.

circuits as to when a statute is retrospective for purposes of the ex post facto clause.

A. There was no retrospective application of SDCL 24-15-24 in the instant case.

At the heart of the legal issue in this case is whether the good time forfeiture provision in SDCL 24-15-24 was applied to events occurring before its enactment and hence, retrospective in violation of the ex post facto clause. Respondent asserts that Petitioner's interpretation of "retrospective" was refuted by the court in Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) aff'd mem. 390 U.S. 713 (1978). Respondent maintains that the Greenfield decision was cited with approval by this Court in Weaver v. Graham, 450 U.S. 24 (1981) and is thus controlling authority in determining whether the statute challenged in the instant case was retrospective.

Petitioners, however, would submit that Respondent's reliance on Greenfield is not justified by the subsequent holding in Weaver. A review of the majority opinion rendered therein reveals that Greenfield was cited only in regard to whether Petitioner in that case was disadvantaged by application of the new statute (Florida statute ch. 944.275(1)). 450 U.S. at 32. It was not referred to in the court's discussion of whether the statute was retrospective.

Although finding, in the context of that case, that the ex post facto clause had been violated, the court in Weaver carefully noted that the statutory reduction in gain time opportunities was not related to infractions or prison behavior, but applied to inmates who complied fully with prison rules and regulations. As duly observed by the court:

> On its face, the statute reduces the number of monthly gain time credits available to an inmate who abides by

> prison rules and adequately performs his assigned tasks. . . .The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision, § 944.27(1) (1975) than he could for the same conduct under the new provision, § 944.275(1)(1979).

450 U.S. at 33, 35. In deciding whether the law changed the legal consequences of acts completed before its affective date, the court was thus, in the context of that case, forced to recast the question as whether the statute was applied to prisoners convicted for acts before the provision's effective date.

In contrast, the statute at issue in this case did not change the amount of good time credits a prisoner could earn for good behavior. The loss of good time credit is meted out only for infractions and then only prospectively. As noted by the court in In re Ramirez, 705 P.2d 897 (Cal. 1985), cert. denied, 476 U.S. 1152 (1986), there is a

"critical difference between diminution of the ordinary rewards for satisfactory performance of a prison sentence and an increase in sanctions for future misbehavior." Id. at 901.

As was the case in Ewell v. Murray, 11 F.3d 482 (4th Cir. 1983), application of the good time forfeiture provision in SDCL 24-15-24 did not add to the punishment for the original crime for which Respondent was incarcerated. That statute was applied only as the result of "new conduct" occurring after the statute was enacted and which constituted a violation of Respondent's parole. Id. at 487. The Petitioners would submit that just as good conduct allowances may be earned by compliance with reasonable prison regulations, they may be lost by subsequent noncomplying conduct. Id. at 486.

Further support for Petitioners' position can be found in Gryger v. Burke, 334 U.S. 728

(1948). In that case, this Court upheld a recidivous statute imposing augmented penalties for subsequent convictions for the same offense as applied to a criminal whose first offense occurred before the statute was passed. 334 U.S. at 732. The recidivous statute in Gryger enhanced the penalty to be imposed for future misconduct just as the good time forfeiture provision now at issue expands the action the parole board can take for the future crimes or misconduct committed by an inmate while on parole. Although both affect past wrongdoers, neither runs afoul of the aims of the ex post facto clause since the operation of each could only be triggered by future crimes. Warren v. United States Parole Commission, 659 F.2d 183 (D.C. 1981), cert. denied, 455 U.S. 950 (1982). As in Warren, the amended statute would not have affected Respondent but for his subsequent criminal behavior.

The instant case therefore does not implicate the policies behind the ex post facto clause since the statute was promulgated before Respondent was released on parole and before he committed his subsequent offenses. Warren, 659 F.2d at 194. Respondent thus knew, or is charged with notice, of the amended statute and the consequences that would await him should he commit another crime while on parole. Since the conduct triggering application of the statute occurred after its enactment, it cannot be said that the ex post facto clause was violated. Id.

In order to agree with Respondent that application of SDCL 24-15-24 violated the ex post facto clause, the Court would have to treat the subsequent parole violation by Respondent as an offense indistinguishable from the criminal conduct that led to imposition of his initial incarceration. Only then could SDCL 24-15-24 be viewed as having

been applied to conduct that preceded its enactment. A similar argument, however, was rejected in United States v. Schramm, 9 F.3d 741 (9th Cir. 1993). As stated therein, a violation of supervised release is, for purposes of the ex post facto clause, an offense separate from that which led to the initial imprisonment. Id. at 743. This same result has been reached by other circuits as well. See United States v. Bermudze, 974 F.2d 12, 14 (2 Cir. 1992); United States v. Blackston, 940 F.2d 877, 882, n.7 (3rd Cir. 1991).

B. There is a conflict between and within the circuits.

Respondent also maintains that those circuit courts which have considered the ex post facto issue have, without exception, followed Greenfield and that there is thus no conflict between the circuits as would justify

granting the petition for writ of certiorari.[2] Petitioners, however, would submit that not only is there a widespread conflict among the circuits, but there is also a conflict between the decisions of the same court of appeals. Scarborough v. United States, 431 U.S. 563, 567, n.4 (1977); Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967).

In Fender v. Thompson, 883 F.2d 303, 304 (4th Cir. 1989), the Fourth Circuit Court of

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[2]Respondent also suggests that granting certiorari in this case because of the conflict which exists between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals would result in certiorari being granted in virtually every case where a writ is granted under 28 U.S.C. § 2254. The Petitioners, however, would assert that it is the nature of said conflict which warrants the granting of certiorari in this case. Baldwin v. Alabama, 472 U.S. 372, 374 (1985). Certiorari is appropriate in a case such as this which involves a conflict between the highest state court and the Eighth Circuit Court of Appeals, both having ruled on the constitutionality of this same state statute. Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Ward v. Illinois, 431 U.S. 767, 770 (1977).

Appeals held that although the conduct in question took place after the effective date of the statute, an amendment to Virginia's parole eligibility statute was applied retrospectively because it rescinded parole eligibility for the underlying conviction. The court rejected the State's argument that the new law did not operate retrospectively because it was enacted before Petitioner's escape. Citing Greenfield, the Fender court held that, despite this "form over substance" argument, the practical affect was an increase in punishment for the first offense. Id. at 307. That same court, however, later reached the opposite result in Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993).

In Ewell, several inmates challenged the State's application of a newly enacted provision which created a DNA bank and imposed a loss of good time credits on any inmate who refused to provide a blood sample. Relying on

Fender, the inmates claimed that the ex post facto clause had been violated since the provisions were not promulgated until after their initial convictions. The court, however, found that the inmates' reliance on Fender did not advance their cause since the provisions in question did not add punishment for the original crime for which the inmates were incarcerated, but were imposed only as a result of new infractions. Id. at 486. According to the holding in Ewell, the State could, consistent with the ex post facto clause, reasonably increase the penalties for prospective violations. Id.

A similar conflict exists within the Ninth Circuit. In United States v. Paskow, 11 F.3d 873 (9th Cir. 1993), the court held that the ex post facto clause was violated when a statutory amendment increasing the penalty to be imposed upon the revocation of supervised release was applied to a parole violator whose

underlying offense was committed before the amendment was adopted. Relying upon Greenfield, the court in Paskow stated that one must look to the date of defendant's original offense and not to the date of the conduct which led to the punishment for the parole violation. Id. at 879.

In United States v. Schramm, 9 F.3d 741 (9th Cir. 1993), the Ninth Circuit Court of Appeals rendered a decision squarely in conflict with that in Paskow. At the time of sentencing, the applicable guidelines at issue in Schramm were silent as to whether the sentence imposed upon revocation was to run concurrently or consecutively with the sentence imposed for the new criminal offense. After defendant was sentenced, however, the guidelines were amended to provide that any term of imprisonment imposed upon revocation of supervised release was to be served consecutively. Because the guidelines had

been amended before defendant violated the terms of a supervised release, the court in Schramm found that there was no ex post facto violation. The court held that the guidelines had not been applied "retroactively" because they were not applied to conduct completed prior to their enactment. Id. at 743. Unlike Paskow, the court recognized that the triggering event was not the original offense, but rather the commission of a new infraction that occurred after the effective date of the statute.

The Petitioners would assert that certiorari is appropriate to resolve this intra-circuit conflict. The issue involved herein is both important and recurrent.

CONCLUSION

This case presents the Court with an opportunity to clarify when a statute is deemed to be retrospective for purposes of the ex post facto clause. The federal courts have

been anything but uniform when asked to consider this issue. The Court's resolution of this controversy would, therefore, lead to a more harmonious situation between the circuits. The Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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ADDENDUM

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 1, 1995

Mark W. Barnett
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Pierre, SD 57501-5070

Re: Joe Class, Warden and Mark W. Barnett, Attorney General of South Dakota, v. Willie Williams, III
No. 94-1289

Dear Mr. Barnett:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on January 18, 1995 as No. 94-1289.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

William K. Suter, Clerk

by /s/

Loretta S. Ruffin
Assistant

Enclosures